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No. 89-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LYNDA KRUSO, et al.,
Petitioners,

vs.

ITT CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners request the Court to grant certiorari in this case on the ground that the statutory procedure for removal of cases from federal court to state court (28 U.S.C. § 1446) is unconstitutional as violative of the due process clause of the Fifth Amendment to the United States Constitution. Petitioners do not contend that this litigation involves a decision conflicting with any ruling of this Court or of any other Circuit, nor do they assert that there has been any decision by the lower court calling for exercise of this Court's supervisory power (Supreme Court Rule 10.1(a)). Rather, and then by only footnote reference (petition, p. 6, n. 2), petitioners request the Court to consider certiorari based upon partial quotation of Supreme Court

Rule 10.1(c), claiming that their "petition presents 'an important question of federal law, which has not been, but should be settled by this Court.' " Petitioners, of course, leave out the condition precedent specified in Rule 10.1(c) — a *decision* on that "important question" by a lower court in this litigation ("*When a state court or a federal court of appeals has decided* an important question of federal law which has not been, but should be, settled by this Court. . . ."; petitioners' omission emphasized). In this litigation, no lower court has ruled on the question petitioners pose for certiorari; indeed, petitioners have never even raised it before. Moreover, petitioners cite no case whatsoever wherein the constitutionality of the removal procedure has ever been questioned.

STATEMENT OF THE CASE

Petitioners filed this tort suit on March 11, 1986 in California state court. On April 10, 1986, by verified petition for removal based on diversity of citizenship jurisdiction, respondents removed the action to the United States District Court for the Central District of California.[1] On April 15, 1986, petitioners filed an "Ex Parte Application for Sua Sponte Order Remanding Removed Case to Superior Court."

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[1] Petitioners do not list all the parties to the proceeding, as required by Supreme Court Rule 24.1(b). The named defendants-respondents are ITT Corporation; ITT Commercial Finance Corporation; ITT Industrial Credit Company; ITT Business Communications Corporation; Fast Forward Leasing Division, a division of ITT Commercial Finance Corporation; Wholesale Finance Division, a division of ITT Commercial Finance Corporation; ITT Communication & Information Services, Inc.; ITT Information Systems, an unincorporated division sued erroneously as a division of ITT Communication & Information Services, Inc.; Rand V. Araskog; Bernard N. Del Bello, Jr.; Ronald L. Kozminske; C. Lamar Potts; Tom Green; Vernon Schroeder; Lori Hanson; Jeff Voegtli (sued erroneously as "Vogelti"); and Barbara Bookwalter. Pursuant to Supreme Court Rule 29.1, the Court is apprised that the only non-wholly owned subsidiary of ITT Corporation is ITT World Directories, Inc.

On April 23, 1986, after considering petitioners' application for remand and respondents' opposition and also conducting a full hearing, the district court denied the application for remand, finding that the only two named defendants (out of 17) who were of non-diverse citizenship were sham defendants added by petitioners solely to attempt to defeat federal jurisdiction.

Petitioners then filed a motion for reconsideration of the denial of their application for remand. After further consideration and hearing, the motion was denied.

In orders entered on August 15 and October 16, 1986, the district court dismissed petitioners' complaint and entered judgments against some of the petitioners on their contract indebtedness to respondent ITT Commercial Finance Corporation.[2]

On November 10, 1986, petitioners filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The *sole* question petitioners presented on appeal was whether the district court possessed diversity of citizenship jurisdiction. The appeal was taken under submission on March 9, 1989, and on April 19, 1989, the Ninth Circuit issued an opinion affirming the district court's denial of remand. Petitioners filed a petition for rehearing on May 1, 1989. On June 26, 1989, the Court of Appeals issued an amended opinion, modifying some non-substantive language in response to a petition for rehearing (to correct and modify opinion) filed by respondents (opinion published at 872 F.2d 1416). Petitioners' petition for rehearing was denied on January 30, 1990.

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[2] The court also entered findings for sanctions against petitioners and their counsel pursuant to Rules 11 and 37, Federal Rules of Civil Procedure, stating in part that petitioners' complaint "was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

Petitioners did not raise the argument that the removal procedure is unconstitutional in either the district court or the Court of Appeals. Thus, although petitioners state in their petition (p. 4, n. 1) that they "did not directly challenge the constitutionality of the removal procedure in either the District Court or the Court of Appeals," the fact is that there was no challenge at all — direct *or* indirect.

ARGUMENT

Summary of Argument

Petitioners' argument that the federal removal statute violates the due process clause of the Fifth Amendment to the United States Constitution should not be heard by this Court because the petition for certiorari satisfies none of this Court's stated "considerations" for grant of certiorari, the question was not raised in the court below, and petitioners' position is invalid.

The question presented should not be considered because there is no lower court decision satisfying the predicate for the Court's discretionary consideration of grant of certiorari (Supreme Court Rule 10.1(c)). In this case, also, there is no reason for the Court not to apply its ordinary rule of not considering issues which were neither raised before nor considered in the lower court.

Petitioners' argument that due process requires a hearing on a petition for removal, before the district court assumes jurisdiction, rather than on a motion to remand, after the court has jurisdiction, is logically invalid. In either event, the court has and must exercise jurisdiction to reach its decision. Moreover, a plaintiff's choice of a state forum, rather than a removing defendant's choice of a federal forum, is not a life, liberty or property right protected by the due process clause. Nevertheless, the removal statutes do provide to a plaintiff the opportunity for a hearing at a meaningful time and in a meaningful manner to object to removal, satisfying even the strictest due process review. In this case, also, respondents have had, and exercised, their full opportunity for a hearing.

The fact that petitioners can cite no case where the constitutionality of the removal procedure has been challenged is no mystery — the question petitioners seek to raise is without merit.

I. PETITIONERS' ARGUMENT THAT THE FEDERAL REMOVAL PROCEDURE VIOLATES DUE PROCESS WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Because petitioners never raised in the court below the argument that the federal removal procedure violates due process, they should not be allowed to raise that issue for the first time in a petition for a writ of certiorari. This is doubly so in this case.

First, the discretionary "consideration" for granting certiorari invoked by petitioners (Supreme Court Rule 10.1(c)) is expressly conditioned on the entry of a *decision by a lower court* on the "important question of federal law [on which certiorari is sought] which has not been, but should be, settled by this court." Here, the essential precondition to petitioners' certiorari request — a decision by a court below on the question presented in their petition for a writ of certiorari — is absent.

Second, this Court will not ordinarily consider issues which were neither raised before nor considered by the lower court. *See, e.g., Adickes v. S.W. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As the Court has stated in dismissing a writ of certiorari as improvidently granted:

> The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here.

Ellis v. Dixon, 349 U.S. 458, 460, *reh'g denied*, 350 U.S. 855 (1955).

There is no reason to deviate from that general rule in this case. Here, having been unsuccessful in convincing the courts below that they lacked jurisdiction, petitioners have concocted an entirely new and frivolous argument in an eleventh-hour effort to delay enforcement of judgments long standing against them. Petitioners make no claim in their petition that their new

argument had been inadvertently overlooked nor do they advance any other reason why this Court should consider an argument never presented to the courts below during the long course of this litigation.

II. PETITIONERS' PETITION IS WITHOUT MERIT

Petitioners seek to challenge as unconstitutional the statutory procedure for removal of a case from state court to federal court. Under that statutory scheme, removal is effectuated upon filing of a notice (formerly petition) for removal. 28 U.S.C. § 1446(a). Upon removal, "[t]he United States district court to which such petition is directed shall examine the petition promptly" and "[i]f it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal." 28 U.S.C. § 1446(c)(4). "If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require." 28 U.S.C. § 1446(c)(5). The plaintiff may file a motion to remand on the basis of any defect in the removal procedure within 30 days after the filing of the notice of removal. 28 U.S.C. § 1447(c). Further, the plaintiff may make a motion to remand if the district court lacks subject matter jurisdiction, or the court may raise the issue *sua sponte*. *Id.*

Petitioners contend that due process requires a hearing in federal court on the issue of removability *before* that court takes jurisdiction over the removed case (petition, pp. 10-11). Under petitioners' postulate, district courts would be required to hold a hearing on each and every notice or petition for removal before proceeding further with the case. Petitioners argue that "the plaintiff's right to move for remand after removal is no adequate substitute for a hearing before removal" (petition, p. 12). This is so, petitioners say, because "plaintiff must ask for

remand from a judge who has *already* taken jurisdiction of the merits of the case" and "a judge who has already become involved in the merits of the case is a far less disinterested adjudicator of the removal issue than he would be *if* he considered that issue *before* he was seised of the merits of the case" (petition, p. 12; emphasis in original).

The premise of petitioners' position is, therefore, that the district court would not have jurisdiction over the case until it granted the petition to remove.

Petitioners' premise is invalid. The district court possesses jurisdiction over the removed case upon the filing of the petition for removal. 28 U.S.C. § 1446. More fundamentally, however, the district court has jurisdiction to determine its own jurisdiction. *See, e.g., United States v. United Mine Workers,* 330 U.S. 258, 291 n. 57 (1947). "If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue." 13A Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3536 at 535. Thus, whether removal were tested on a motion by plaintiff to remand, a notice or petition by defendant to remove, or *sua sponte* by the district court, the court would possess, and must exercise, jurisdiction over the case to render its decision. Consequently, petitioners' contention that due process is violated unless a hearing is held on a defendant's notice or petition to remove rather than on a plaintiff's motion to remand because the court has jurisdiction in one situation, but not in the other, is a legal oxymoron.

Similarly flawed is petitioners' argument that a hearing must be conducted on the petition for removal because the "judge . . . has already become involved in the merits of the case" and therefore "is a far less disinterested adjudicator of the removal issue" (petition, p. 12). Contrary to petitioners' argument, however, the district court considers remand of a case either *sua sponte* or on a motion to remand at the outset of the litigation, *not* after it has become "involved in the merits." The *only* issue before the court at that time is jurisdiction.

The district court has no more "taken over jurisdiction of the case on the merits" (petition, p. 10) when the remand issue is considered than has a court when it rules upon a motion to dismiss for lack of jurisdiction. Under petitioners' logic, a defendant would never be afforded procedural due process in pursuing a motion to dismiss for lack of jurisdiction; instead, the plaintiff would be required to file a motion for leave to file a complaint and have a hearing on that motion, with notice to the contemplated defendant.

Petitioners' proclamation that a plaintiff's choice of forum "necessarily evokes the fullest protection of due process of law" under the Fifth Amendment (petition, p. 9) is likewise without legal basis. The due process clause protects against deprivations of "life, liberty or property." There is no authority that a plaintiff's choice of a state forum, instead of a federal forum with concurrent jurisdiction, is a life, liberty or property right which should be accorded procedural due process scrutiny.[3] The cases cited by petitioners are inapposite; they involve deprivation of actual, fundamental *rights,* not the mere *choice* of a desirable forum. *Boddie v. Connecticut,* 401 U.S. 371 (1971) (right of indigent citizens to access to state court, the only available forum, in order to obtain divorces); *Armstrong v. Manzo,* 380 U.S. 545 (1965) (a parent's right to notice of the pendency of adoption proceedings which could permanently terminate parental rights); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (right of welfare recipients to evidentiary hearings prior to deprivation of their welfare benefits).

In enacting the removal statutes, Congress determined that a plaintiff's initial choice of a state forum may be superseded

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[3] Petitioners also misconstrue whose "rights" are involved. While a plaintiff has a "right" to bring a lawsuit, where, as in this litigation, there is concurrent jurisdiction in state and federal court, a defendant has the "right" — granted by Congress — to remove the case from state to federal court.

under certain conditions to allow a defendant to remove the case to federal court. As this Court said more than 100 years ago, the statutes give "to the plaintiff in the first instance an election of courts before suit is brought; and where the suit was commenced in a state court a like election to the defendant afterwards." *Chicago and Northwestern Ry Co. v. Whitton,* 80 U.S. 270, 289 (1871). To characterize a plaintiff's qualified privilege to choose the initial forum for his lawsuit as a "right" on a par with, and deserving of the same due process protection as, the right to "the very means by which to live" (*Goldberg v. Kelly,* 397 U.S. at 264), or the right to access to court when that right is "the exclusive precondition to the adjustment of a fundamental human relationship" (*Boddie v. Connecticut,* 401 U.S. at 383), would distort the due process clause beyond all rational parameters.

Finally, and in any event, the removal statutes *do* provide an objecting plaintiff " 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner' * * * 'for [a] hearing appropriate to the nature of the case.' " *Boddie v. Connecticut,* 401 U.S. at 378. As summarized *supra,* filing and service of a "notice" is required for removal, and the validity of the removal is tested by initial examination of the petition by the district court[4] and by a hearing ordered by the court or on a motion to remand filed by the plaintiff. 28 U.S.C. §§ 1446(c)(4) & (c)(5), 1447(c). Indeed, the removal procedure is weighted against removal, with all of the evidentiary and procedural burdens being placed on the removing defendant, including being required to affirmatively establish federal jurisdiction and the right to remove.

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[4] Petitioners again misstate the law when they argue that the district court "totally oust[s] state jurisdiciton without even the most cursory review of the petition to determine whether the requirements for removal have been met" (petition, p. 10).

In this litigation, petitioners fully availed themselves of their "meaningful" opportunity to contest removal. Within five days after removal, petitioners filed an "Ex Parte Application for Sua Sponte Order Remanding Removed Case to Superior Court."[5] The issue was briefed and the district court held a full hearing. When the district court denied the motion for remand, petitioners filed a motion for reconsideration, which was also briefed and heard. In the district court and later in the Court of Appeals petitioners did not claim they were deprived of an opportunity to be heard or even that any arguments against removal remained unarticulated. Petitioners should not now be heard to complain that the removal procedure deprived them of any right to be heard "at a meaningful time and in a meaningful manner." This is particularly true when petitioners, throughout the entire four-year course of this litigation, have never before raised the argument that the removal procedure is violative of the due process clause.

Petitioners not only are unable to establish that a plaintiff's initial choice of a state forum is somehow a constitutionally protected "right" to which procedural due process attaches, but also are unable to show that the removal procedure deprives a plaintiff of any procedural protection. If the goal of the due process which petitioners claim is to ensure that a plaintiff is given the right to oppose removal and that no case be improperly or improvidently removed, then the removal procedure set forth in 28 U.S.C. §§ 1446 and 1447 already fully protects those interests.

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[5] Interestingly, by such "application" petitioners attempted to obtain remand without respondents having any opportunity to respond, let alone be heard.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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